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In the Supreme Court of the United States

No. 1024.

OCTOBER TERM, 1963.

BOB JONES UNIVERSITY, INC., a Corporation,

Appellant,

v.

THE CITY OF GREENVILLE, SOUTH CAROLINA, a Municipal Corporation; GERALD W. SHAW, City Manager, and JAMES H. WARD, Building Commissioner, of said City,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

JURISDICTIONAL REPLY BRIEF FOR APPELLANT.

Questions Presented by Appellees' Motion to Dismiss.

Appellees base their Motion to Dismiss this Appeal upon the first two grounds named in *Rule 16, subdivision 1 (b), of this Court*, namely:

(1) That no substantial Federal question is involved; and,

(2) That certain questions raised in this appeal are not reviewable, for not having been raised in, and passed upon by, the state courts.

Since this brief is a reply, it will be less comprehensive than appellant's Jurisdictional Statement brief. Therefore, appellant will state here that nothing contained in the latter brief is waived, and it will now proceed to meet the objections raised by appellees in their said Motion to Dismiss, limiting this brief to the issues therein raised.

1. IS A ZONING ODINANCE HARMFUL TO THE PUBLIC SUBJECT TO FEDERAL CONSTITUTION AND ITS AMENDMENTS?

(One reply to appellees' challenge that no substantial Federal question is presented.)

In its amended complaint, appellant alleged that the amendatory zoning ordinance passed by the City of Greenville on July 10, 1962 — Appendix B, page 79, Jurisdictional Statement — was void, being violative of the Due Process and Equal Protection clauses in the Fourteenth Amendment to the Constitution of the United States. Appendix A, page 43, Jurisdictional Statement. On page 16 of its Jurisdictional Statement, appellant recalled that the Master held that the passage of a zoning ordinance was the exercise of a state police power, and that "this disposes of the contention of Plaintiff as contained in its Complaint with respect to any inhibition that may be interposed by the State and Federal Constitution." Transcript of Record, folio 753. Appellant excepted to this holding. Appendix A, page 52, Jurisdictional Statement. The trial court overruled all of appellant's exceptions by a Decree. Appendix A, page 56, Jurisdictional Statement. Appellant excepted and appealed to the Supreme Court of the State of South Carolina. Appendix A, page 57, Jurisdictional Statement. The said State Supreme Court overruled all exceptions. Appendix A, page 68, Jurisdictional Statement. By Question Number 4, in its Notice of Appeal to this Court, appellant brings that issue before this Court. Appellees, by their Motion to Dismiss, necessarily deny that this is a substantial Federal question.

In *Dobbins v. City of Los Angeles*, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169, which was a zoning case, this Court held

that said issue was a substantial Federal question. This Court said:

> "The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, . . ."

In the foregoing case the Due Process clause may be considered to have been involved also, for the denial of the equal protection of the laws works a denial of due process of law also. *Twining v. New Jersey*, 211 U. S. 78, 99, 29 S. Ct. 14, 53 L. Ed. 97.

Therefore, when, as in the case at bar, a party contends that a zoning ordinance is subject to, and that it violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States — See appellant's Question Number 1 also, and the State Supreme Court holds otherwise, then a substantial Federal question has arisen, which can be brought to this Court by appeal.

The action of appellees reasonably indicates that they do not expect to sustain the state courts on this point, for they consume 5½ pages of their 12 pages of argument in their brief, trying to show that the ordinance, *on its merits*, does not violate the Federal Constitution. If appellees believed the state courts' position were sound, then the ordinance would not be subject to the Federal Constitution, and there would be no reason whatsoever for them to take up almost one-half of their brief trying to justify it before this Court.

Appellant contends that the ordinance is subject to the Federal Constitution and the amendments thereto — See Question Number 4 in its Notice of Appeal to this Court, and that it violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to said Constitution — See Question Number 1 in said Notice of Appeal. Therefore, appellant can consistently argue the de-merits of said ordinance.

2. IS AN AMENDATORY ZONING ORDINANCE THAT WORKS DETRIMENTALLY TO THE PUBLIC, ARBITRARY, UNREASONABLE, AND VOID?

(In reply to appellees' Topics 1 and 2.)

In the zoning ordinance case of *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, this Court said that for the exercise of the zoning power to be valid, it must be "asserted for the public welfare." The counterpart of that statement is, that when that power is asserted for the benefit of individual landowners, the action is void. The record abounds with evidence that the zoning ordinance involved in this case, comes under the counterpart rule. And only one witness, Mr. E. Mitchell Arnold, contradicted that evidence. That the state courts were trying to serve two masters is conceded by the Master's Report, in a portion not cited or quoted by appellees. So, appellant will quote that portion of the Master's Report, to wit:

> "We all must recognize that any city growing as rapidly as the City of Greenville must have changes. Such changes may result to the detriment of certain individuals. This Court cannot close its eyes to the rights of any individual, but on the other hand, it must keep its eyes open to the rights of the majority. Such is the foundation of our society, and for our community to progress, such rights must be recognized and upheld."

That the use of property for business purposes, in close proximity to residential property, damages the latter, goes without argument, because that is the foundation principle upon which the power to zone is based. Therefore, the interest of the Wilsons in getting their residential property converted to shopping center use, conflicted with the welfare of the community, which owned valuable residential property on three sides of the Wilson property. The reason businesses are suffered to come into residential communities is not to benefit the owners of the property converted to business, but because the community needs such businesses in its midst.

In the case at bar, the community did not need a Wilson shopping center — there are 6 shopping centers already within a radius of 2 miles; not one single person, other than the Wilson property owners, in the community petitioned the city council for the shopping center, but 174 petitioned against it.

The state courts could have avoided the impossible position of trying to promote both of these conflicting interests, had they recognized that a city, in passing a zoning ordinance, is performing a legislative function *(Dunbar v. Spartanburg*, 226 S. C. 360, 85 S. E. 2d 281), and the public interest is the paramount consideration *(Zoning*, 101 C. J. S. Sec. 275). Individual rights can be protected only by the grant of variances *(Zoning*, 101 C. J. S. Sec. 275), and that is an administrative act for the executive branch of the city government *(Zoning*, 101 C. J. S. Sec. 205). Code Sections 47-1007 - 47-1009 are the variance statutes in South Carolina. And amendatory zoning ordinances, where their purpose is to promote the welfare of individuals, are null and void. *Esso Standard Oil Co. v. Town of Westfield*, 33 N. J. Super. 324, 110 A. 2d 148, 150; *Zaehring v. Long Beach Township*, 56 N. J. Super. 26, 151 A. 2d 425, 430. Under the application of the above rules, the Wilson amendatory zoning ordinance would have been declared void.

The applicability of the above legal principles will become apparent as appellant develops the case from the record.

Appellees say that a hearing before the Planning and Zoning Commission, and three hearings before City Council, afforded proponents and opponents an opportunity to be fully heard concerning the ordinance, before it was passed. See page 3 of their brief. But, the evidence shows that the commission and council were immune to what went on at those meetings. The undisputed evidence shows these facts:

(1) That in the late summer or early fall of 1961, the Wilsons prepared a dinner, and invited the city council and zoning board to it, to dine, look over the Wilson prop-

erty, and to talk zoning (Transcript of Record, Ff. 695-698);

(2) That the application — not signed — for re-zoning the Wilson property was filed October 10, 1961 (Transcript of Record, F. 582). That was the day the new Mayor took office (Transcript of Record, F. 692);

(3) That 174 residents of the Wilson property community filed a written protest against re-zoning the Wilson property (Transcript of Record, F. 746); and,

(4) That at the zoning commission and city council hearings, only two proponents appeared — they were the Wilson lawyer and the Wilson economic survey expert (Transcript of Record, F. 422), but the house was full of opponents (Transcript of Record, F. 424).

On page 5 of their brief, appellees cite the code sections empowering municipalities to zone property for the promotion of health, safety, morals and the general welfare. Appellees cite and quote from the Master's Report, the trial court's Decree, and the decision of the state supreme court, to the effect that the purposes of the enabling zoning act would be promoted by a Wilson shopping center, yet there is probably not one single word in all of the testimony to sustain such conclusions. The undisputed evidence on the said statutory purposes was this:

Health: There are approximately 3,500 students on appellant's campus (Transcript of Record, Folio 651); and Dr. Parker, a physician and member of the Greenville City Council, on cross examination, testified that a shopping center on the Wilson property, in close proximity to appellant's campus, would be a means of communicating contagious diseases (Transcript of Record, Ff. 704-705);

Safety: Wade Hampton Boulevard is a heavily traveled super highway, over which children cross in going to and coming from school (Transcript of Record, Ff. 491-493); Mr. Poore, who was the Acting Zoning Board Director when the Wilson application for re-zoning was before the zoning board (Transcript of Record, F. 541), said that a

Wilson shopping center "would . . . compound" an "already serious problem of traffic on Wade Hampton Boulevard" (Transcript of Record, F. 431);

Morals: No evidence touched upon morals. The proposed shopping center is only in the proposal stage; there is no fixed moral level on which such businesses must operate, and any evidence on that point at this time would be speculation. Appellant chose at the beginning of this litigation to build its case on facts.

General Welfare: The community is already over-built with shopping centers — there are 6 shopping centers within a radius of two miles of the Wilson property, and they were described by Mr. Harold Stone, a Greenville realtor, as follows: (1) Lake Forest Shopping Center, consisting of about 15 stores, 3 or 4 blocks from the Wilson property (Transcript of Record, Folio 267); (2) Stone Plaza Shopping Center, consisting of 10 or 12 stores, about 8 blocks from the Wilson property (Transcript of Record, Folio 269); (3) the Fields Company, a large discount store, about 1 mile from the Wilson property (Transcript of Record, Ff. 271-272); (4) Pleasantburg Shopping Center, consisting of about 20 stores, about one and one-half miles from the Wilson Property (Transcript of Record, Ff. 273-274); (5) Hampton Village Shopping Center, consisting of about 10 stores, about one and one-half miles from the Wilson Property (Transcript of Record, Ff. 275-276); and (6) the Wade Hampton Shopping Center, consisting of stores and parking areas on 12 acres of land, across Karen Drive and about 50 feet away from the Wilson property (Transcript of Record, Ff. 277, 278, 300)

The following witnesses all testified that there was no need for another shopping center in that community: Mrs. L. A. Jordan (F. 203); Mr. Harold Stone (F. 267); Mr. E. Roy Stone (F. 337); Mr. James H. Simkins (Ff. 393-395); Mrs. Ruth Piper (F. 489); Mr. Kohlbaugh (F. 518); and Mr. William Greaves (F. 534). Folio references are to the Transcript of Record.

There is not one single word of testimony in the Transcript of Record contradicting any one of the above witnesses on any of the above matters.

Next, appellant comes to the question of damages that a Wilson Shopping Center would cause the community, and here a conflict develops in the testimony — appellees produced one witness, Mr. E. Mitchell Arnold, who disagreed with everybody else.

Mr. Patrick, a realtor in Greenville for the last 38 years (F. 209), and whose qualifications were admitted by counsel for appellees (F. 212), testified that the residences across Wade Hampton Boulevard from the Wilson property were in the $20,000.00 to the $30,000.00 range (F. 218), and that a shopping center on the Wilson property would damage them 25% (F. 220); and that the Jones residence, adjoining the Wilson property, was worth between $75,000.00 and $100,000.00 (F. 222) and that it would be damaged 33 and 1/3% (F. 221). Mr. Harold Stone, another realtor of Greenville (F. 258), corroborated Mr. Patrick (F. 263). Mr. E. Roy Stone, another Greenville realtor (F. 313), and in the business in Greenville for the last 24 years (F. 315), testified that he had inspected and appraised appellant's university property at $22,000,000.00 (F. 342), and that in his opinion a shopping center on the Wilson property would damage the university property from 20% to 25% (F. 341). Dr. Johnson, Business Manager of Bob Jones University (F. 58), testified that the replacement cost of the university property would be between $25,000,000.00 and $30,000,000.00 (F. 131), and he estimated that a shopping center on the Wilson property would damage the university property $5,000,000.00 (F. 143).

Mr. E. Mitchell Arnold, a witness for appellees, testified that in his opinion, a shopping center on the Wilson property would not cause anyone any damage (Ff. 601-606).

All of the foregoing evidence cited by appellant was pertinent, relevant and competent. However, no one can say that the state courts considered any of it. Practically all of it was ignored in both the trial court's Decree and in the State Supreme Court's Decision, which is the way ruled out testimony is treated. The Master to whom the case was referred to take the testimony, to rule on its

admissibility, and to report it to the trial court, ruled out much of appellant's testimony, and over appellant's objection, ruled in much of appellees' testimony, by a blind ruling which did not specify, or provide any other means by which it could be determined, what evidence of appellant he ruled out, and what evidence of appellees he ruled in. And this brings us to the next point discussed in appellees' Motion to Dismiss this Appeal.

3. IS A PARTY TO AN ACTION ENTITLED TO KNOW WHAT EVIDENCE IS FOR AND AGAINST HIM?

(In reply to appellees' Topic 3.)

The Transcript of Record will show that when the taking of testimony commenced, objections began to be interposed to the testimony then being offered. Thereupon one of appellant's then attorneys proposed a standing objection to the relevancy of all testimony. The Transcript of Record shows this:

> "Mr. Freeman: I understand that we need not interpose our objections — may we have a standing objection?
>
> "The Master: I think that is the understanding.
>
> "Mr. Arnold: It is agreeable with me." (F. 149.)

See, also, folios 370, 385 and 387, in Transcript of Record.

Under the statute — *Section* 10-1409, South Carolina Code, 1962 (printed in Appendix B, page 76, Jurisdictional Statement), the Master was required to take all testimony offered, to rule on its admissibility, and to report the testimony he ruled inadmissible separately from that he ruled admissible. The Master took all of the testimony offered, but he did not separately report the evidence he ruled inadmissible from that which he ruled admissible. Therefore, appellees cannot successfully contend that the Master followed the statute, for the following quotation, taken from the Master's Report (Transcript of Record, F. 746), was the Master's sole ruling on the admissibility of the testimony, to wit:

> "I find that much testimony offered by both parties was irrelevant and incompetent. Both parties agreed that I must take all testimony, but that I had the right to consider only such testimony as I thought proper. I have done this, and, consequently, a large portion of the testimony and exhibits have been sifted as the 'chaff from the wheat.' "

Under that blind ruling, appellant or any one else could not know what portions of its testimony had been ruled out, or what portions of appellees' testimony had been ruled in.

By exceptions to the Master's Report, on up to this Court, appellant has asserted that it was denied due process and equal protection, in violation of the Due Process and Equal Protection clauses in the Fourteenth Amendment to the Constitution of the United States — See argument to Question Number 2, on page 13, of appellant's Jurisdictional Statement.

Appellees say that the Master was following state procedural precedent — see page 11 of their brief. There are two answers to that position:

(a) If it violates appellant's federal constitutional rights, consonance with local state procedure will not save it. In *Davis v. Wechsler*, 263 U. S. 22, 44 S. Ct. 13, 68 L. Ed. 143, this Court said:

> "Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

(b) Appellant disagrees with the contention that the ruling of the state courts in this case on this point is in accord with established state practice, but that it is contrary thereto.

It will be observed that since the Master did not specify in some way what evidence had been ruled out, it was also impossible to know what evidence had been left in the case.

This blind way of ruling on the evidence had been condemned in all South Carolina state cases prior to the case now on appeal in this Court.

In *Elrod v. Elrod*, 230 S. C. 109, 94 S. E. (2d) 237, the Court said:

> "As stated in *Moore v. Johnson*, 7 S. C. 303, 'The facts should be stated briefly, distinctly, and independently of any view taken of the law of the case.' It is only in this way that a case tried before a master or referee can be intelligently reviewed on appeal."

In *Cox v. First Provident Corporation*, 240 S. C. 130, 125 S. E. (2d) 1, the Court quoted with approval the rule as stated in *Pack v. Katzin*, 215 N. C. 233, 1 S. E. (2d) 566, as follows:

> "The referee should enter his ruling on each objection, either at the time of taking the testimony, or subsequently, or in his report, to the end that it may be known whether the evidence objected to was considered or excluded in making his findings of fact."

In the *Cox* case supra, an objection was directed at a certain line of testimony, and the objection was sustained, but the ruled out testimony was not separately reported as required by the above mentioned statute. The Court held that since it was clearly known what evidence had been ruled out, that the Master's failure to separately report it worked no harm to anyone. But that is not the case at bar, because appellant could not point out:

> (a) The portions of its testimony that was ruled out, argue against its being ruled out before the trial court, and get a trial court ruling thereon, and appeal any adverse trial court ruling to the state supreme court, if appellant thought it was wrong; and,
>
> (b) The portions of appellees' testimony that was ruled in over its objection, argue against its being ruled in before the trial court, and get a trial court ruling thereon, and appeal any adverse trial court ruling to the state supreme court, if appellant thought it was wrong.

The state supreme court in its decision — Appendix A, page 68, Jurisdictional Statement, mentions the fact that appellant does not point out: (a) Its evidence which was not considered, but should have been; nor (b) appellees' evidence which was considered, but which should not have been. If appellant could have done that, then the particular point now under discussion would not have come up. The unreasonableness of the Court's position is easily pointed out. The appellant was the party appealing to the state supreme court, so it had the burden of making and of sustaining every point, and to follow the Court's suggestion, this is what would have happened:

— As to appellant's testimony —

Appellant would have had to take every word of its testimony, and would have had to have shown that every word of it was competent, to sustain this point. If any portion of it was not competent, then the Court could have said — there is the portion ruled out. But it might not have been.

— As to appellees' testimony —

Appellant would have had to take every word of appellees' testimony, and would have had to have shown that every word of it was incompetent, to sustain this aspect of the point. If any portion of it was competent, then the Court could have said — there is the portion ruled in. But it might not have been.

Due process and equal protection of the laws guarantees in the Fourteenth Amendment to the United States Constitution entitled appellant to know what the evidence for and against it was, and its being kept in the dark in that respect, rendered the judgment against it void. In *Interstate Commerce Commission v. Louisville & N. R. R. Co.*, 1912, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431, this Court said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. . . . Such authority,

however beneficiently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

". . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given the opportunity to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

When a party is entitled to a certain thing, no one can, over his objection, substitute something else in lieu thereof. *Wyoming v. United States*, 255 U. S. 489, 41 S. Ct. 393, 65 L. Ed. 742. Therefore, the state courts could not, consistently with the United States due process and equal protection clauses aforesaid, compel appellant to exchange its stronger position of knowing what the evidence in the case was, for the weaker position of speculating on what it might be. And the state supreme court erred when it refused appellant's request to remand the case to the trial court with instructions to put the record in the condition the law required. See Appendix A, Jurisdictional Statement, page 71.

When appellant asserted that the Master's blind way of ruling on the admissibility of the evidence violated its federal constitutional rights, and the State Supreme Court held that said way was authorized by, and that it was legal under, *Section* 10-1409, *of the South Carolina Code*, 1962, said statute was drawn into question as being repugnant to the Constitution of the United States, and the state supreme court decision sustained the validity of the statute, thereby making an appealable case for this reason, also, to the Supreme Court of the United States. Cf. *People of State of Illinois v. Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649.

4. CAN APPELLANT MAINTAIN QUESTIONS 8 THROUGH 12 RAISED FOR THE FIRST TIME IN THIS APPEAL?

(In reply to appellees' Topic 4)

Appellees say in their brief, page 12, that appellant's Questions Numbers 8 through 12 cannot be raised in this Court for the first time in this appeal, and cite two cases of this Court to sustain their position. Appellant will first examine the authorities appellees rely upon:

In *White River Lumber Co. v. State of Arkansas*, 279 U. S. 692, 49 S. Ct. 457, 73 L. Ed. 903, a back tax state statute was involved, and the company contended, for the first time in its appeal to this Court, that the way the statute was being applied, denied to it the equal protection of the laws, in violation of the Equal Protection clause in the Fourteenth Amendment to the Constitution of the United States.

In *Edelman v. State of California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387, Edelman contended, for the first time in his appeal to this Court, that the California State vagrancy statute, under which he had been convicted, was void, as being in conflict with the Constitution of the United States, or amendments thereto.

Now it will be noticed that in both of said cases:

(a) The questions raised for the first time on appeal to this Court could have been raised, heard and decided by the state courts; and,

(b) The questions so raised were not subject-matter jurisdictional questions.

Therefore, the cases cited by appellees have no application to the case at bar, because:

(a) The questions raised for the first time on this appeal to this Court could not have been raised, heard and decided by the state courts, for reasons hereinafter set forth; and,

(b) The questions so raised are subject-matter jurisdictional questions.

Appellees' objection to appellant's raising the new questions for the first time in this appeal, is based solely upon the ground that said questions are being raised too late, thereby reasonably giving rise to two inferences:

(1) An implied one, that appellant once had the right to raise said questions; and,

(2) An express one, that appellant has lost that right through failure to timely exercise it.

Preliminary to arguing the facts and the law, appellant states this legal proposition as self-evident, and which will be shown later to be applicable, that a right once possessed, cannot be lost for failure to timely exercise it, unless and until the party possessing it has had at least one opportunity to assert it. If this proposition is sound and applicable, it alone would completely answer appellees' objection.

Appellant thinks that it can sustain the following propositions:

(1) The raising of a federal constitutional question is never too late, when it is raised at the first time in the litigation, that it is raisable; and,

(2) Subject-matter jurisdictional questions may be raised for the first time, at any time, while the case is still in litigation.

Appellant will now undertake to sustain the above propositions, because the sustaining of them, will sustain appellant's said questions.

(1.)

Questions Raised on First Opportunity.

Question 8 challenges the power and authority of the South Carolina State Legislature to elect or appoint the state judges and justices; Question 9 challenges the right of judges and justices so elected or appointed to act in any judicial capacity; Question 10 challenges the validity of the election or appointment of said judges and justices because of discrimination practiced by the legislature; Question 11

challenges whether appellant got the federally guaranteed trial to which it was entitled, when its case was heard before and decided by judges and justices so elected or appointed; and Question 12 challenges the validity of the judicial acts and actions of judges and justices so elected or appointed.

If those questions had been raised in the state courts, it goes without argument that the state court judges and justices would have had to hear and determine them, and they were without jurisdiction of the subject-matter so to do, because:

(a) For the purpose of hearing and determining those questions, *they would have been the court*, and by accepting office under the state's elective system, they had committed themselves to the validity thereof, and furthermore, they could only decide the questions one way — that is, sustain the validity of the system, for if they declared it void, then they would not be judges and justices, and their decisions that they were not would have been coram non judice. *Luther v. Borden*, 48 U. S. 1, 12 L. Ed. 581. Private individuals cannot, by their own fiat, constitute themselves judges or justices. Cf. *Stoll v. Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104. And a judgment rendered by a void court is itself void. In *Courts*, 14 Am. Jus., Section 172, it is said:

> "If the only law purporting to confer jurisdiction on the court to try the case is void, then all acts of the court are without authority and also void."

Had appellant attempted to have raised these new questions in the state courts, and assuming that appellees did not demur the case out of court, and that the judges and justices heard and sustained them, then, according to that decision, it would have been rendered by persons without any judicial authority, and it would have been void. A void judgment could oust no one from office, and the judges and justices would be left sitting just where they were before the questions were heard and decided. This shows, that if the judges and justices are to make a legal and effective

decision on these questions, they could decide only one way — that the challenged elective system was valid. When a court has no choice, and can decide a question in only one way, it has no jurisdiction to decide at all. In *Erickson et al. v. United States et al.*, 264 U. S. 246, 44 S. Ct. 310, 68 L. Ed. 661, this Court said:

> "Jurisdiction is the power to decide the case either way, as the merits may require. *The Fair v. Kohler Die Co.*, 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716; *Geneva Furniture Co. v. Karpen*, 238 U. S. 254, 258, 35 Sup. Ct. 788, 59 L. Ed. 1295; *Louisville, etc., R. R. Co. v. Rice*, 247 U. S. 201, 203, 38 Sup. Ct. 429, 62 L. Ed. 1071; *Hart v. Keith Exchange*, 262 U. S. 271, 273, 43 Sup. Ct. 540, 67 L. Ed. 977."

(b) Appellant was also denied the right to raise these new questions in the state courts by the South Carolina State statutes printed in Appendix B, pages 76 and 77, Jurisdictional Statement. *Section* 10-2251 of said statutes abolished all legal remedies against usurpation office holders, and *Section* 10-2256 thereof provided as the sole remedies (1) a suit by the Attorney General, or (2) a suit by a private party upon leave granted by a circuit judge, and in either instance the suit must be against the usurpation office holders, who are the state court judges and justices of the State of South Carolina, and they are not parties to the case now before this Court. And they could not be made parties, because an action to test the validity of the State's judicial elective system would have nothing in common, either with regard to parties or subject-matter, with an action to test the validity of a city zoning ordinance. The joinder of causes and of parties in the state courts of South Carolina is governed by *Section 10-701, Code of Laws of South Carolina*, 1962, which reads as follows:

> "The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable or both, when they all arise out of:

"(1) The same transaction or transactions connected with the same subject of action;

"(2) Contract, express or implied;

"(3) Injuries with or without force to person and property or either;

"(4) Injuries to character;

"(5) Claims to recover real property, with or without damages for the withholding thereof, and rents and profits of such property;

"(6) Claims to recover personal property, with or without damages for the withholding thereof, or,

"(7) Claims against a trustee by virtue of a contract or by operation of law.

"But the causes of action so united must (a) all belong to one of these classes, (b) except in actions for the foreclosure of mortgages, affect all of the parties to the action, (c) not required different places of trial and (d) be separately stated."

The foregoing procedural statutes show how deceptive the usurpation suit statute — *Code Section* 10-2256 is. That section permits a suit — if it pleases the circuit court judge, but the suit must be against the usurpation office holder. Of course, in suits between private parties, public officers are not parties thereto. And under standard procedural statutes, they cannot be made parties, because there is not the required subject-matter relationship between (1) private party versus private party actions, and (2) usurpation office holder actions, for both to be united in one suit. And *Code Section* 10-2251 abolished all methods of questioning office usurpation, except those provided in *Section* 10-2256. Therefore, private suitors cannot question, in the state courts, the legality of the state's judicial elective system. If appellees' contention that the new questions raised on this appeal cannot be maintained, because appellant did not do the impossible and raise them in the state courts, then private suitors can never raise them, and thus the state legislature has devised a way of passing a substantial amount of

state action out beyond the reach and operation of the Federal Constitution. Appellant contends that it cannot be deprived of its Federal Constitutional rights to lawfully elected judges and justices by any such obvious circumventing means, and that it can maintain the new questions in this Court.

Appellant will now pursue another angle of this question raisability matter:

Assuming solely for the purpose of argument, and without conceding, that the new questions were waiverable ones, that does not necessarily mean that this Court should not entertain them, because the general rule that appellate courts will not hear questions not raised in the trial courts has its exceptions. One of those exceptions is to prevent a plain miscarriage of justice. In *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037, this Court considered a question not raised in the lower federal courts, saying:

> "These decisions and others like them, while generally recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice."

This exception was applied in *Uebersee Finanz-Korporation, A. G. v. McGrath*, 343 U. S. 205, 72 S. Ct. 618, 96 L. Ed. 893.

What more perfect case could there be than the one at bar for the application of this exception, where appellant was barred by state statutes from raising the issues to which the new federal constitutional questions appertain?

Courts can raise on their own motion questions of public importance, because the public is never in default. In such cases the questions were not raised below, for had they been, the Court would have no occasion to be moving on its own. Therefore, this is another exception.

In *Petty v. Porter*, 322 F. 2d 308 (6th Circuit), 1963, the Court was asked to raise own its motion certain questions not raised in the court below, and while the Court did not consider that a proper case to act on its own motion, it nevertheless recognized that it had the power so to do. It said:

> "Counsel for appellant appeal to this Court to invoke its authority to consider on its own motion, this being an exceptional case, any errors that were made and to correct any errors of counsel or the court, so that an injustice will not be done. This Court does have the power in exceptional cases and in the interest of justice to consider questions of error not raised in the trial court. *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96, 101, C. A. 3; *Troupe v. Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253, 260, C. A. 2. See: *Hormel v. Helvering*, 312 U. S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037; *Sunfire Coal Co. v. United Mine Workers*, 313 Fed. 2d 108, C. A. 6; *Wilson v. Ward Baking Company*, 318 F. 2d 674, C. A. 6."

This is a perfect case for the application of the above rule — if appellant cannot raise these new questions, for the Court itself to do so, because it is an exceptional case, it is of great public importance, and the injustice should not be permitted to go uncorrected. It is exceptional, because it is not often that circumvention of the federal constitution is attempted by state statute; it is of great public importance, because the right of more than 2,000,000 people to life, liberty and property is in jeopardy; and it presents a case of injustice, because the lower courts have made many serious errors, and arrived at an unjust decision.

If the South Carolina State Legislature is successful with these experimental statutes, then the Fourteenth Amendment and all other federal constitutional restraints upon the states just as well be written off the books.

(2.)

When May Subject-Matter Jurisdictional Questions Be Raised?

Subject-matter jurisdictional questions can be raised at any time, so long as the case is in litigation. This case is still in litigation.

Since the case at bar comes from the South Carolina state courts to the United States Supreme Court, if the right to raise such questions has been lost, it would have to be because of either (A) South Carolina State Law, or (B) United States Law. No other laws could be applicable. But neither state nor federal law terminate that right while the case is in litigation. But, on the contrary, both state and federal law preserve that right. So, how could appellant lose the right, when there is no law taking it away, but there are laws continuing it?

(A.)

South Carolina State Law.

Statutory Law: Code of Laws of South Carolina, 1962, provides:

> *Section* 10-642. "The defendant may demur to the complaint when it shall appear upon the face thereof that:
>
> "(1) The court has no jurisdiction of the person of the defendant or the subject of the action;
>
> "(2) The plaintiff has not legal capacity to sue;
>
> "(3) There is another action pending between the same parties for the same cause;
>
> "(4) There is a defect of parties, plaintiff or defendant;
>
> "(5) Several causes of action have been improperly united; or,
>
> "(6) The complaint does not state facts sufficient to constitute a cause of action."

Section 10-645. "When any of the matters enumerated in Section 10-642 do not appear upon the face of the complaint the objection may be taken by answer."

Section 10-647. "If no such objection be taken either by demurrer or answer the plaintiff or defendant shall be deemed to have waived the objection, excepting only an objection (a) to the jurisdiction of the court, (b) that the complaint does not state facts sufficient to constitute a cause of action or (c) that the answer does not state facts sufficient to constitute a defense."

Case law: In Bramlett et al. v. Young et al., 229 S. C. 519, 93 S. E. 2d 873, the Court said:

"Even though the appellants did not raise the question of jurisdiction in the lower court, objection to the jurisdiction of the subject-matter may be made at any time during the progress of the action, and such jurisdiction cannot be waived or conferred by consent. Want of jurisdiction of the subject-matter may be taken advantage of at any stage of the proceeding. *Black v. Town of Springfield*, 217 S. C. 413, 60 S. E. 2d 854; *Ladshaw v. Hoskins*, 204 S. C. 346; 29 S. E. 2d 480; *Senn v. Spartanburg County*, 192 S. C. 489, 7 S. E. 2d 454. We, therefore, conclude that the objection to the jurisdiction of the Greenville County Court is timely made in this Court."

The above quotations show that there is nothing in either the statutory or case law in South Carolina that takes away appellant's right to raise these new subject-matter jurisdictional questions, but on the contrary both classes of said state laws save that right as long as the case is in litigation.

(B.)

United States Laws.

The laws of the United States save this right, too, for as long as the case is in litigation. And subject-matter jurisdictional questions do not have to be raised in the

courts below, or at the first opportunity, but can be raised at any stage of the case, in the Supreme Court of the United States. In *Matson Nav. Co. v. United States*, 284 U. S. 352, 52 S. Ct. 162, 76 L. Ed. 336, this Court said:

> "As the want of jurisdiction is of the subject-matter, it may be considered and appropriate judgment given at any state of the proceedings, *either here or below*." Emphasis added.

See, also, the authorities cited by appellant on this point in its Jurisdictional Statement, pages 33 and 34.

(C.)

The Merits of the New Questions.

Appellant, in its Jurisdictional Statement, pages 25-27, and at other places, called to this Court's attention the judicially noticed facts upon which the new questions were based. Appellees called to the Court's attention no contra or other facts. Therefore, appellees must have been satisfied with appellant's factual statement.

The able and competent counsel for appellees challenge only the ability of appellant to raise these questions for the first time in this Court; they do not question the soundness of the legal principles appellant associates with the new questions, nor do they question the applicability of those principles. In regard to the amendatory zoning ordinance, appellees questioned whether a substantial federal question was raised, and then argued also that the ordinance violated no federal constitutional law. But, they do not question the merits of these new questions. Therefore, if they are raisable now, it would seem that appellees impliedly concede that they are substantial, and federal.

CONCLUSION.

Appellant does not believe that there are any legal obstacles in the way of this Court hearing and determining all of the questions raised in this appeal. Constitutional objections were raised: (1) Against the amendatory zoning

ordinance in the amended complaint; (2) against the Master's blind way of ruling on the testimony in the exceptions to the Master's Report, and when the state courts held that *State Code Section* 10-1409 authorized that method, and that it was lawful, that drew that statute into question — *People of State of Illinois v. Board of Education*, supra; and (3) when the trial judge and State Supreme Court undertook to render judgment(s), they tacitly determined that they had jurisdiction of the parties and of the subject-matter — *Chicago Life Insurance Company v. Cherry*, 244 U. S. 25, 29, 37 S. Ct. 492, 493, 61 L. Ed. 966; *Stoll v. Gottlieb*, and this involved the State Statute and State Constitutional Sections under which they held judicial offices — *People of State of Illinois v. Board of Education*, supra.

The amendatory zoning ordinance and *State Code Section* 10-1409 make a proper case for appeal. *Title 28, United States Code, Section 1257 (2)*. And the case being here properly on appeal, other raisable federal questions can be heard, even though if they were standing alone, certiorari would be the proper course. *Flourney v. Wiener*, 321 U. S. 253, 64 S. Ct. 458, 88 L. Ed. 708. However, appellant asks this Court to treat this appeal as an application for writ of certiorari, if that is necessary to get all questions before the Court.

Where cases have been brought to this Court on appeal, when certiorari was the proper course, the Court has treated the appeal as an application for certiorari, and granted the writ, when matters of public importance were raised by the questions presented. *Charleston Federal S. & L. Assn. v. Alderson*, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; *Wilson v. Cook*, 327 U. S. 474, 66 S. Ct. 663, 90 L. Ed. 793; *Raley v. State of Ohio*, 360 U. S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344, to mention just a few. The public importance aspect of the case at bar far exceeds the public importance in any of the cases cited, because here the right of 2,000,000 people who live in South Carolina to life, liberty and property is in jeopardy, if usurpers

are holding all of the judicial offices of major importance in said state.

If appellant's positions are sustained by this Court, then the judgment appealed from should be reversed and vacated, and the case remanded to the Court of Common Pleas for Greenville County, where it was properly brought, to be there proceeded with by a lawfully elected trial judge, and from whose decision either party might appeal to the State Supreme Court, to be there reviewed by lawfully elected justices. The Federal Due Process and Equal Protection of the Laws clauses envision lawful tribunals in which to try a case. And that is a right conferred upon the plaintiff equally with the defendant — otherwise the law against discrimination would itself discriminate. Furthermore, to be effective, the right to life, liberty and property so secured, must be available to a party in the particular case in which his claim to life, liberty or property is being adjudicated, and to make that so, the pertinent points must be raisable at some stage in the proceedings, which, in the case at bar, said points became raisable for the first time on appeal to the Supreme Court of the United States. In *Gibbons v. Ogden*, 22 U. S. 1, 6 L. Ed. 23, this Court said that the framers of the Federal Constitution said what they meant, and meant what they said. Nothing less should be said about the strong words of protection contained in the Fourteenth Amendment, and the said amendment necessarily confers upon this Court the power and authority to entertain the new questions raised on this appeal, if this Court does not already have such power. Otherwise, the Federal Constitution will have assumed the unworkable position of having given rights without providing means to enforce them, because this Court is the only Federal Court that ever gets to review state court cases.

Respectfully submitted,

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